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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/757,813	01/15/2004	Donald C. Roe	7294C	5408

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THE PROCTER & GAMBLE COMPANY
Global Legal Department - IP
Sycamore Building - 4th Floor
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EXAMINER	
REICHLE, KARIN M	

ART UNIT	PAPER NUMBER
3761	

MAIL DATE	DELIVERY MODE
01/29/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/757,813	ROE ET AL.	
	Examiner	Art Unit	
	Karin M. Reichle	3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *17 December 2009*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-3,5-7,10,11,15-17 and 19* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-3,5-7,10,11,15-17 and 19* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12-17-09 has been entered.

Claim Language Interpretation

2. The claim language is interpreted in light of the definitions set forth in the paragraph bridging pages 5-6 and page 27, lines 10-13. Any other claim terminology which has not been specifically defined will be interpreted in light of its broadest common definition, e.g. its dictionary definition. In claims 1 and 10, it is now claimed that the topsheet, backsheet, core, acceptance element and fecal storage element are all separate from each other yet are joined to define the article. Since "separate" as defined by the dictionary is "to differentiate or discriminate between; distinguish", "dissimilar; distinct", such claims are interpreted to require such structures/elements which are separate/distinguishable/distinct from each other yet are "joined" to define the article. However again note page 20, lines 18-22 of the instant specification and that the claims do not require that the elements are limited to performing a single function, i.e. it is not claimed that each individual element is the only element having such function and/or it has no other functions and/or all elements having such function are required to

be an element as claimed. With regard to the claim terminology "fecal storage element", Applicant's 5-8-06 remarks refer to page 25, lines 8-10 of the instant application which sets forth that the storage element is a storage element which is "capable of storing viscous bodily wastes". The remarks also refer to page 15, lines 25-27 of the application where a "viscous fluid bodily waste" is defined as "any waste discarded from the body having a viscosity greater than about 10cP and less than about 2x10 cP at a shear rate of one l/sec" in a controlled stress rheometry test. Lines 15-18 of the same page 15 set forth that runny feces or menses are "viscous fluid bodily waste". Finally, lines 29-31 of the same page 15 point out the viscosities of water and peanut butter for reference. In light of such disclosures, a "fecal storage element" as claimed will be interpreted as an element which is capable of storing fecal waste having a viscosity greater than about 10cP and less than about 2x10 cP at a shear rate of one l/sec in a controlled stress rheometry test. With regard to claims 1 and 10 it is noted that the claim now requires a fecal storage which is a "macroporous" (note page 27, lines 10-13 of the instant disclosure with regard to the definition "macroporous") storage element, i.e. a storage element having pores too large to effect capillary transport, generally having pores greater than about 0.5 mm in diameter and more specifically, having pores grater than about 1.0 mm in diameter. See 2173.05(b), A, and 2173.05(c), I, and also the discussion in paragraph 3 infra. Note claims 5-7, 15-17 and 19 also require such storage element only include a "macroparticulate structure" having a multiplicity of particles and page 27, lines 22 et seq, i.e. only requires the macroporous structure have at least two particles of a preferred size. See also discussion infra in paragraphs 5-6.

Claim Rejections - 35 USC § 112

3. Claims 1-3, 5-7, 10-11, 15-17 and 19 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1 and 10, and thereby the claims dependent therefrom, now claim the fecal storage element is a "macroporous" storage element. Such claim terminology is defined as set forth on page 27, lines 10-13, i.e. "refers to materials having pores too large to effect capillary transport of fluid, generally having pores greater than about 0.5 mm in diameter and more specifically, having pores greater than about 1.0 mm in diameter" (emphasis added). However see again 2173.05(b), A, with regard to the claim language "greater than about" and 2173.05(c), I, with regard to the broader range, i.e. "too large to effect...fluid", and the narrower ranges, i.e. "generally…in diameter", "more specifically…in diameter". Therefore, the claims are indefinite since there was nothing in the specification, prosecution history, or the prior art to provide any indication as to what range of specific activity is covered by the term "about" and it is unclear whether the narrower ranges further limit the broader range or not.

Claim Rejections - 35 USC § 103

4. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

5. Claims 1-3, 5-7, 10-11 and 15-17 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Thompson et al '208, (and thereby, by incorporation, Thompson '135,

Kimberly-Clark EP '417, Ahr '045 (and thereby, by incorporation, Radel et al '314), Moore et al '642 and Lash et al '022).

Claim 1: See Claim Language Interpretation section supra, hereinafter referred to as CLI, and Thompson '208 at the Figures, col. 5, lines 39-44, col. 7, line 57-col. 8, line 6, col. 14, line 41-col. 19, line 2 (and thereby Thompson '135 at especially the Figures, the entire disclosure of EP '471, the entire disclosure of '045, esp. Figure 20 and the paragraphs bridging cols. 9-10 and 2-3, and thereby, '314 at Figures, esp. 11-12 and col. 18, last paragraph), col. 9, line 54-col. 14, line 38, col. 21, line 30-col. 22, line 2 (and thereby Moore '642 at col. 1, lines 46-62 and Lash et al '022 at col. 4, line 29-col. 6, line 35 and col. 14, lines 55-58 and 64 et seq), i.e. Thompson et al teaches a disposable absorbent article for wearing on or about a lower torso of a wearer for receiving bodily exudates which comprises (i.e. "joined", i.e. directly or indirectly, together to define such article), a "separate" topsheet, see CLI and, e.g., at least the distinguishable uppermost layer/laminate of 9, see cited portions of '045 and '314, a "separate" backsheet, see CLI and, e.g., 12, a "separate" absorbent core, see CLI and, e.g., at least one of the sheets of 11, a "separate" acceptance element, see CLI and, e.g., at least another distinguishable layer/laminate of 9, which comprises at least one aperture having an area of between 0.2 sq. mm to 25 sq. mm (See Thompson '208 at col. 15, line 61-col. 16, line 12 and the paragraph bridging cols. 18-19, i.e. EP '417 teaches filaments of a certain diameter, a topsheet having a certain number of filaments per square inch to define openings of equal size there between, i.e. the area between the filaments per sq. inch calculated from such disclosed specifics includes apertures having an area as claimed), and a "separate" storage element, see CLI and, e.g., 10 or another sheet of 11, between the acceptance element and the core. See also discussion of 3) infra. Claim

1 further requires 1) the storage element to have a compressive resistance of at least about 70%, 2) the apertures have an effective aperture size of between about 0.2 sq. mm to about 25 sq. mm and 3) the storage element being a "fecal storage element" and separate from the absorbent core. With regard to 1), while Thompson '208 teaches a layer 10 having resilience and a ratio of wet to dry caliper of at least 80%, and preventing flow interference while being form fitting and a layer 11 of curled, twisted, chemically stiffened and cross linked fibers, such fibers having increased dry resilience, i.e. the ability to return toward an expanded original state upon release of a compress ional force applied thereto, and retaining their configuration during use at the portions cited supra, Thompson et al does not teach such layers having a "compression resistance" of at least about 70%. It is however noted that at page 29, lines 8-23 of the instant specification that Applicants while expressing the desire for the storage element to resist compression when a force is applied to maintain a significant level of storage capacity and restore itself to substantially its original thickness when the force is removed, does not disclose the criticality of the specific resistance claimed, i.e. the criticality of 70% rather than, for example, 45%. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to employ a compressive resistance of at least about 70% on the Thompson et al device since it has been held that where the general conditions of a claim are disclosed in the prior art as in the instant case, i.e. see discussion supra, it is not inventive to discover the optimum or workable ranges by routine experimentation. In re Aller, 105 USPQ 233. With regard to 2), see page 25, lines 2-5, of the instant application, and thereby Roe '338. Furthermore, see again the portions of Thompson '208 and EP '417 cited supra, i.e. the topsheet of Thompson et al comprises or obviously comprises (Note MPEP 2131.03 and 2144.05) at least one aperture having an area of

between 0.2 sq. mm to 25 sq. mm, e.g. apertures of equal size of such area, for enhanced acceptance of fluid. Therefore, it is the Examiner's first position that there is sufficient factual evidence for one to conclude that the topsheet of Thompson '208 would necessarily and inevitably include the claimed "effective aperture size" when tested according to the test set forth in Roe '338. Alternatively, i.e. the Examiner's second position, Thompson '208 teaches a topsheet which receives or accepts fluid. It is however noted that while at page 23, lines 19-25 of the instant specification Applicants express the desire for the acceptance element to pass waste there through, the criticality of the specific effective aperture size claimed enabling the element to do so is not set forth, e.g. the criticality of 30 sq. mm rather than 25 sq mm, for example, has not been set forth. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to employ an effective aperture size as claimed on the Thompson et al device, if not already, since it has been held that where the general conditions of a claim are disclosed in the prior art as in the instant case, i.e. see discussion supra, it is not inventive to discover the optimum or workable ranges by routine experimentation. In re Aller, 105 USPQ 233. With respect to 3), see the Claim Language Interpretation section supra and, in addition to the portions of the prior art already cited, see also col. 1, line 11-13, col. 13, lines 43-45 and col. 31, lines 40-42 of '208 and col. 3, lines 28-29 of '022, i.e. "capable of absorbing…body waste fluids such as urine and feces", i.e. capable of absorbing/holding fluid feces. Therefore, it is the Examiner's first position that the prior art teaches a storage element 10 or a layer or sheet of 11 which is "separate" from 11 (as well as all portions of the topsheet) or the remainder of the sheets of 11 (as well as all portions of the topsheet and 10), respectively, and which element is capable of storing fecal waste having a viscosity greater than about 10cP and less than about

2x10 cP at a shear rate of one l/sec in a controlled stress rheometry test, i.e. "viscous fluid bodily waste", because '208 and '022 disclose articles and/or components thereof capable of absorbing /holding menses, i.e. a "relatively thick fluid" and/or fluid feces which as disclosed by the instant application are "viscous fluid bodily wastes". Alternatively, i.e. the Examiner's second position, since '208 and '022 disclose articles and/or components capable of absorbing/holding menses, i.e. a "relatively thick fluid", or fluid feces, there is sufficient factual evidence for one to conclude that such would necessarily and inevitably include a viscosity greater than about 10cP and less than about 2x10 cP at a shear rate of one l/sec when tested similarly to the claimed element, i.e. in a controlled stress rheometry test. Finally, i.e. the Examiner's third position, the prior art, at a minimum, discloses the desire that the article and/or components absorb/hold menses, i.e. a "relatively thick fluid" or fluid feces, i.e. relatively thick fluid bodily wastes, i.e. the same general conditions as those claimed. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to employ a storage element as claimed on the Thompson et al device, if not already, since it has been held that where the general conditions of a claim are disclosed in the prior art as in the instant case, i.e. see discussion supra, it is not inventive to discover the optimum or workable ranges, i.e. the claimed range of viscosity, by routine experimentation. In re Aller, 105 USPQ 233.

Claim 1 now also requires 4) the fecal storage element be a "macroporous" storage element, see CLI and discussion in paragraph 3 supra, i.e. as best understood the element has pores too large to effect capillary transport of fluid, i.e. a function, capability or property of the pores, and/or generally having pores "greater than about" 0.5 mm in diameter. However, see, e.g., '208 at Figures, the paragraph bridging cols. 8-9, esp. col. 9, lines 14-23 (note the

terminology "**inter**-fiber" as compared to "**intra**-fiber" and col. 9, lines 8-14 also), col. 12, lines 27-28 and 50-51, col. 1, lines 13-30, col. 13, lines 42-49 and the discussion of claims 5-6 and 19 infra of '208 and '022. Therefore, it is the Examiner's first position that the prior art teaches the element comprise a "macroporous" storage element since it teaches an element, e.g. element 10, having pores, e.g. **inter**-fiber spacings, having the claimed function, capability or property, i.e. lack of capillarity, and/or pores, e.g. **inter**-fiber spacings due to, e.g., curling/amplitude of the described size, i.e. greater than 0.5 mm in diameter. In any case, the Examiner's second position, at the very least, '208 teaches/contemplates an element, e.g. 10, which is high loft/soft, fluffy and comfortable to the wearer which lacks interfiber capillarity/has holding capacity, e.g. **inter**-fiber spacings of the size to provide the function property or capability as claimed, i.e. lack effective capillary transport/have holding capacity, or an element, e.g. element 10 or a sheet of 11, having storage/holding capacity due to pores, e.g. **inter**-fiber spacings due to curling/amplitude of or particles of the described size, i.e. greater than 0.5 mm in diameter and thereby, also recognize **inter**-fiber spacings/pores are result effective variables. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to employ a storage element as claimed on the Thompson et al device, if not already, since it has been held that where the general conditions of a claim are disclosed in the prior art as in the instant case, i.e. see discussion supra, it is not inventive to discover the optimum or workable ranges, i.e. the claimed "macroporosity" as best understood, by routine experimentation. In re Aller, 105 USPQ 233. Note not only paragraph 3 again but also 6.

Claim 3: See portions of Thompson '208 and '135 cited with respect to claim 1 supra.

Claims 5-6: See portions of Thompson '208 with respect to claim 1 supra, e.g. layer 11 includes layers having absorbent particles of a size, i.e. the shape of the particles spherical, i.e. area is dII, and the first paragraph of col. 15 of '022, e.g. particle size greater than 1410 microns or 1.4 mm, or, e.g., layer 10 includes fibers, i.e. particles, which are absorbent, see, e.g. col. 13, lines 43-49, having pores, e.g. **inter-**fiber spacings, having the claimed function, capability or property, i.e. lack of capillarity, and/or pores, e.g. **inter-**fiber spacings due to, e.g., curling/amplitude of the described size, i.e. greater than 1.4 in diameter.

Claims 5 and 7: See portions of Thompson '208 cited with respect to claim 1 supra, and paragraph bridging pages 28-29 of the instant application, i.e. layer 10 includes nonabsorbent, fibers, i.e. particles, with wettable surfaces, i.e. liquid insensitive fibers, which fibers have dimensions, see col. 12, lines 50-51 .

Claims 2 and 10-11 and 15-17: Applicant claims the acceptance element having an effective open area of at least 30%. However, see page 25, lines 2-5, of the instant application, and thereby Roe '338. Furthermore, see again the portions of Thompson '208 and EP '417 cited supra, i.e. the topsheet of Thompson et al includes or obviously includes an open area of 30-60% for enhanced acceptance of fluid. Therefore, it is the Examiner's first position that there is sufficient factual evidence for one to conclude that the topsheet of Thompson '208 would necessarily and inevitably include the claimed "effective open area" when tested according to the test set forth in Roe '338. Alternatively, i.e. the Examiner's second position, Thompson '208 teaches a topsheet which receives or accepts fluid. It is however noted that while at page 23, lines 8-13 of the instant specification Applicants express the desire for the acceptance element to pass waste therethrough, the criticality of the specific effective open area claimed enabling the

element to do so is not set forth, e.g. the criticality of 30% rather than 28% for example has not been set forth. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to employ an effective open area of at least about 30 % on the Thompson et al device, if not already, since it has been held that where the general conditions of a claim are disclosed in the prior art as in the instant case, i.e. see discussion supra, it is not inventive to discover the optimum or workable ranges by routine experimentation. In re Aller, 105 USPQ 233.

Claim 19: See CLI and discussion of claims 5-6 supra and note that the language "about" allows some leeway with regard to the dimension it modifies, MPEP 2131.03 and 2144.05, i.e. the particles, see again CLI supra, i.e. at least two particles, as best understood have a nominal size of between about 2 mm and about 16 mm.

Response to Arguments

6. Applicant's remarks, of which the remarks bridging pages 6-7 are substantially identical to those of 12-04-08, have been considered/reconsidered but are/still are deemed not persuasive for the reasons set forth supra, e.g. they are not commensurate in scope with the disclosure, the claim language, the prior art teachings and/or the prior art rejections. For example, claims 15 and 15 do not require a "macroporous" storage element only of particles of the disclosed size or of the size claimed in claim 19. See again CLI and the discussion of such claims supra, e.g. only require at least two particles alone or of such approximate, i.e. nominal size. See also again paragraph CLI as well as, e.g., the discussion of claim 1, 4) supra. It is note that the portion of Thompson cited, e.g. col. 8, lines 53-53, does not disclose what is argued, e.g.

it discloses capillary suction "in the typical case". Note again, e.g., the paragraph bridging cols. 8-9, "intra-fiber" as compared to "inter-fiber" spacings, i.e. the later being the pores of the element, i.e. porous fibers, not porous element direct fluid. Again attention is invited to *In re Fitzgerald*, 619 F.2d 67, 70, 205 USPQ 594, 596 (CCPA 1980), i.e. the burden to show that materials are not substantially identical, in fact, is shifted to Applicant.

Conclusion

7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karin M. Reichle whose telephone number is (571) 272-4936. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tanya Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Karin M. Reichle/
Primary Examiner, Art Unit 3761

January 25, 2010